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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1972

No. 72-1326

DONALD BUFORD, et al.,

Petitioners,

-vs-

THE SOUTHEAST DUBOIS COUNTY SCHOOL CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The Opinion of the Court of Appeals is set forth in the Appendix to the Petition herein. The Order and Memorandum of Decision of the District Court for the Southern District of Indiana is not set forth in the Appendix to the Petition, and is set forth in the Appendix to this "Brief for Respondent in Opposition".

Question Presented

The "Question Presented" as stated in the Petition is not stated in terms of the findings of fact in this case. Petitioners have improperly attempted to raise questions relating to the First Amendment based on selective and inaccurate references to only a part of the evidence. The question presented, properly stated, is whether the District Court was required under the evidence presented to mandate the reopening of an out-dated public high school in Birdseye, Indiana, built before 1900 and closed at the end of the 1970-71 school year, which had only 104 pupils who now attend the public high school of the Respondent public School Corporation located in Ferdinand, Indiana, the Forest Park High School, which building is leased by the Respondent School Corporation from the Catholic Diocese under a long-term lease at a reasonable rental, with the Diocese exercising no control whatsoever over school operations and with no right to do so, and where the District Court specifically found that "a determined effort has been made by school officials to operate the school system in good faith as a public school corporation and to minimize any religious connection between the schools and the Catholic Diocese".

Statement of the Case

Petitioners' "Statement of the Case" distorts the actual facts as found by the District

Court. Petitioners make selective references to certain of the evidence presented as a basis for their legal arguments and theories. Hence Respondent School Corporation is obliged to restate the case in terms of the findings of fact made by the District Court. Page references are to the pages in the Appendix forwarded to this Court by the Clerk of the Court of Appeals for the Seventh Circuit under date of March 14, 1973. Accordingly, facts omitted from the Petition will be set forth therein, together with a correction of inaccuracies in some of the "facts" that the Birdseye Petitioners did make reference to.

The Respondent Southeast Dubois County School Corporation is a public school corporation organized under the Indiana School Corporation Reorganization Act of 1959 and came into existence on January 1, 1969, out of three townships in the southeast part of Dubois County, Indiana, namely Jefferson to the east in which the town of Birdseye is located, Jackson in the center and Ferdinand to the south (11a-12a, 39a).

On or about October 7, 1970, Respondent adopted a plan of consolidation of its school facilities, which plan included the closing of the Birdseye High School at the beginning of the 1971-72 school year (22a). The Birdseye High School, built before 1900, with only 104 students, had a total of seven rooms and a former office used for a library, a kitchen and small cafeteria, with no toilet facilities or student lockers, with only 33 course offerings and with many other deficiencies (175a-177a, 308a-312a, 314a). Forty to forty-five percent of these 104 students were not from Birdseye, but were from the Schnellville area, and consequently were of the Catholic faith (67a, 159a). Former Birdseye High School students were transferred to the high school at Ferdinand, which

opened on August 26, 1971. The high school at Ferdinand is a modern, up-to-date building, which now has 475 students and 60 course offerings for its students (177a, 304a-307a, 314a).

Early in 1971, fifteen members of the student councils of the high schools at Ferdinand and Birdseye, Indiana, held five joint meetings to plan the consolidation of the two high schools. They also held several "mixers" and proposed to the School Trustees, as a result of these joint meetings, a new name for the school ("Forest Park High School"), a new school ring and school mascot, all of which proposals were adopted by the School Trustees of the school corporation (222a-224a). The consolidation of the two high schools was carried out quite successfully. No student or parent has objected or complained in any way to school officials about this consolidation (213a, 220a, 224a, 230a-231a).

Both the Principal of the Forest Park High School (87a, 232a) and the Guidance Director of the Forest Park High School are of the Protestant faith (212a). No student has ever complained to the Guidance Director about any religious influence in the high school (218a). The six nuns teaching in the high school are public school teachers governed by the laws of the State of Indiana and not by the Catholic Archdiocese (172a-173a, 229a, 241a). They are highly qualified teachers duly licensed by the State of Indiana and follow directions from the State Department of Public Instruction (221a, 229a, 235a).

There have been no religious artifacts, objects or statues anywhere in the Forest Park High School since the defendant public school corporation came into existence in January, 1969 (104a, 116a, 171a, 211a). The Guidance Director, a Protestant, stated that the Forest

Park High School looks just like any other public high school in the State of Indiana (212a).

No Catholic services are being held immediately prior to school hours in any of the Catholic churches located near any of the schools in the public school corporation (167a-168a, 184a, 297a). Although some of the nuns used to wear their "habits" or veils, this was a matter of personal choice (183a), and pursuant to the Order of the District Court herein, this practice is to be discontinued (65a).

All the books used in the public school corporation since its formation on January 1, 1969, are contained on the booklist approved by the Indiana Department of Public Instruction, which booklist is required to be used in all public schools in the State of Indiana. No books not contained on this list have been used in the high school during the 1971-72 school year (180a-181a, 299a-303a). Many private non-Catholic groups use the high school facilities such as the Boy Scouts, and all types of civic organizations, and such use is not in anyway limited to Catholic groups (183a). All books and periodicals purchased for the high school library since January 1, 1969, have been authorized and approved by the State Department of Public Instruction of the State of Indiana (235a-236a). Approximately 120 to 130 periodicals are now purchased for the library, of which approximately 20 relate to the Catholic faith and are being phased out (242a). All periodicals purchased are listed by title and submitted to the Indiana Department of Public Instruction (243a). Any request by any student for a religious publication of any particular faith would be taken into consideration (243a), but no such request has been received to date. In the future, materials having a religious orientation be eliminated or writings reflecting the beliefs of Protestant denominations as well as those

of the major non-Christian religions be made available to students, according to the Court Order (65a).

The high school library has a set of Catholic encyclopedias and also sets of non-Catholic encyclopedias, such as a set of Compton's and Americanas (132a). The library also has books by non-Catholic religious leaders such as Norman Vincent Peele, The Gideon Bible, Malcolm Boyd and a non-denominational interpretation study of the Bible used for literature courses, and back issues of the Christian Herald publication (238a-239a).

The Forest Park High School is located four blocks from the Catholic Church in Ferdinand, Indiana. Between the high school and the Catholic Church in these four blocks are located a privately-owned lumber yard and a number of privately-owned residences, along Jefferson Street, a public highway (90a, 205a, 210a). The High School is on a public street, and the school grounds are bounded on two sides by public streets (211a) and on at least two sides by privately-owned property, and not by Church property (211a).

No religious instructions have ever been given in the public high school in Ferdinand, Indiana (186a, 218a).

The Catholic Diocese retains no say-so over the use and occupancy of the high school buildings (163a). Lessee has possession of the building, which must be used in accordance with Indiana law and proper governmental authorities (327a). Upon the exercise of its option to purchase at the end of the lease term, the high school building will become the property of the public school corporation. No purchase price need be paid at that time because the lease rental payments during the term of the lease will be equal to and are to

be applied on the purchase price (324a, 327a). This lease was approved by the Indiana State Board of Tax Commissioners on September 1, 1971, after a finding that a necessity exists and that the agreement was fair and reasonable (95a, 316a). The salary of the Superintendent of Schools (as well as all other employees of the school corporation) is paid by the taxpayers (248a).

Only four of the Petitioners testified at the trial. Of the four, only two had any child that ever attended the Forest Park High School. One of these parents testified that his daughter there was "getting along all right" so far as he knew (152a).

This same parent observed that his son attending the elementary school in St. Anthony, Indiana, may have received "Catholic indoctrination" (149a). However, this incident happened in 1960 (151a), and does not relate in any way to the Forest Park High School which is the subject of this lawsuit.

None of the parents had ever visited the Forest Park High School during school hours (91a, 144a), or had never discussed their fears of "Catholic influence" with any of the school officials themselves (92a, 213a).

Four students testified at the trial in support of this attempt to re-open the Birdseye school. One of these was a girl residing in Birdseye who quit school rather than go to the high school in Ferdinand, Indiana, because she considered it a "Catholic school". She had never been inside the Forest Park High School at Ferdinand, and had never discussed her concerns with any of the school officials (99a-100a). On one occasion when a group of students went to the library to get reference materials on an assigned paper in Health, the librarian was careful to indicate the separate

location of non-Catholic and Catholic source materials in the library, and even pulled out from the library shelves herself, the non-Catholic source materials for the use of the non-Catholic students (237a). The student relating this incident got one of the non-Catholic books for her own paper (107a). Another girl stated that the teacher commented one day during an English class studying Anglo-Saxon England, that more than one-half of the class was Catholic (111a), her only concern being she did not want to be mistaken for a Catholic (117a). Although this girl also said "They call us names", and that she did not feel welcome (113a), students from Birdseye in general have adjusted well to the high school in Ferdinand (213a, 220a, 224a, 230a-231a). Twenty percent of the students at the Forest Park High School are from the Birdseye area, but they constitute twenty-eight percent of the elected student officers (314a).

A high school student mentioned that there are reproductions of paintings in the high school that are of a "religious" theme (116a). However, these reproductions are of masterpieces of art painted by Renoir, Rembrandt, Picasso, and Velaquez, and are displayed for their artistic merit and not as a matter of religion (225a, 230a). Pursuant to the Court Order, the collection of reproductions of painters and sculptors, both ancient and modern, will be expanded (65a).

The Superintendent of Schools has taken whatever action is appropriate to eliminate any "religious influence" in the school system. As soon as he became Superintendent of Schools in January, 1969, he saw to the immediate removal of a statue on the high school grounds (171a). Under his leadership, the religious instructions given in the elementary schools, even before school hours, was eliminated at

the commencement of the 1971-72 school year (185a, 198a). The number of nuns teaching in the high school is decreasing each year under his leadership (179a).

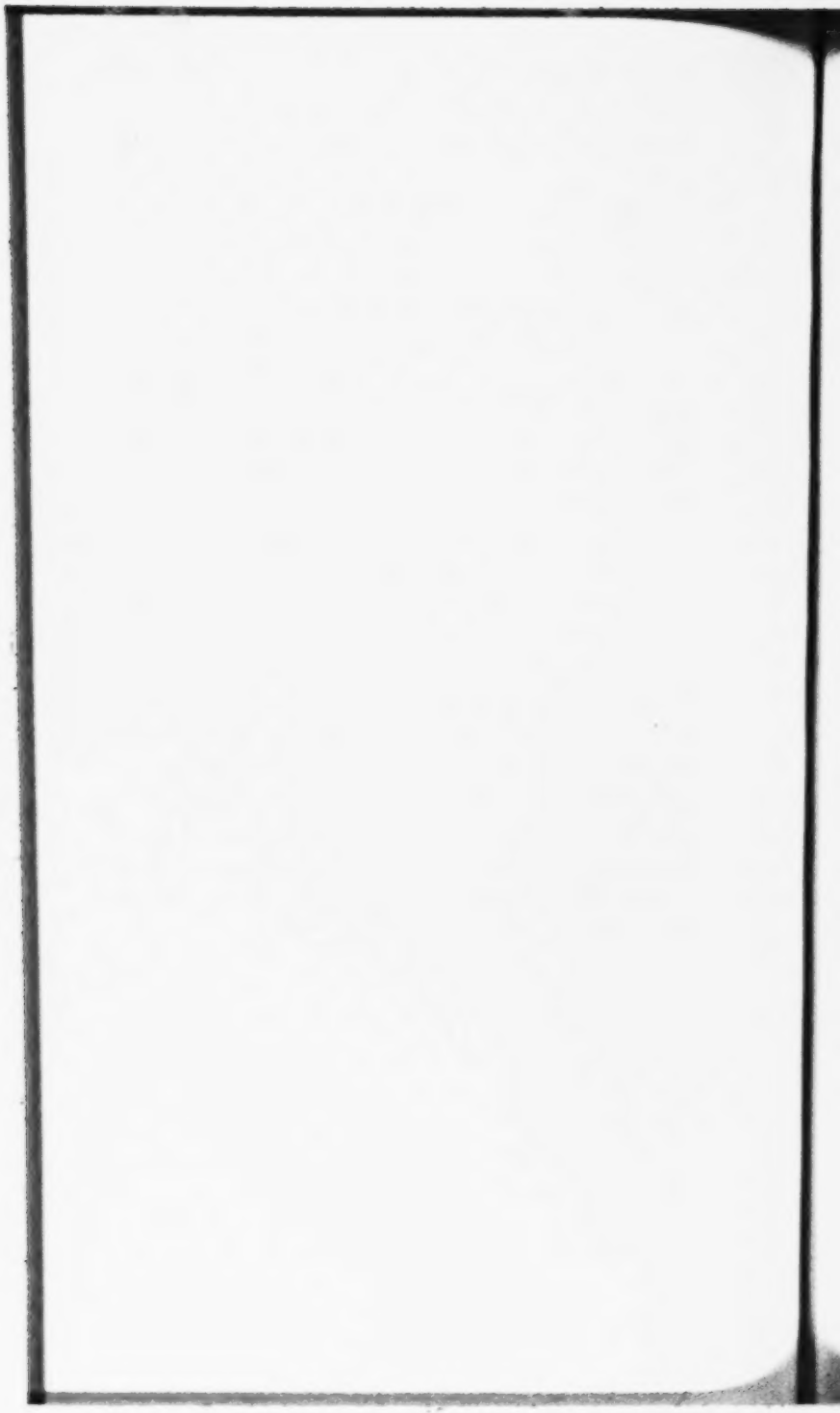
Argument

I.

Decision Not In Conclict With Any Decision Of This Court

Petitioners argue that the decision of the Court of Appeals herein conflicts with a decision or decisions of this Court, a consideration for certiorari contained in Supreme Court Rule 19.

In support, Petitioners cite cases on the general subject of the establishment clause of the First Amendment to the United States Constitution that have been decided in recent years by the United States Supreme Court (p.8-11). However, Petitioners do not even purport to set forth the finding or holding in these cases to argue that they "conflict" with the decision of the Court of Appeals herein. Petitioners quote certain language from these cases, but this language, not placed in the context of the case itself, cannot support a serious argument under Supreme Court Rule 19. These cited cases hold that a state may not enact a law which provides that all public school children shall attend morning bible-reading exercises (School District of Abington Township, Pennsylvania v. Edward Lewis Schempp (1963) 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844); that New York Schools cannot have a prayer in a public school room even though certain students were permitted to remain silent (Engel v. Vitale (1962) 370 U.S. 421, 82 S. Ct. 1261, 8 L. Ed. 2d 601); that a property tax exemption for religious organizations is lawful because the legislative purpose is neither the advancement nor the inhibition of



religion and the end result or effect of the exemption does not result in excessive government entanglement with religion (Walz v. Tax Commission (1970) 397 U.S. 664, 90 S. Ct. 1409, 25 L. Ed. 2d 697); that a state cannot force public school pupils to salute the flag while reciting the pledge of allegiance, under penalty of expulsion (West Virginia School Board of Education v. Barnette (1943) 319 U.S. 624, 63 S. Ct. 1178, 87 L. Ed. 1171); and that state aid for parochial schools in Pennsylvania and Rhode Island is unconstitutional (Lemon, et al. v. Kurtzman (1971) 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745).

After this generalized survey of First Amendment cases, Petitioners arrive at the apparent reason for their filing, and state (p. 11) "the most precise point of conflict" with a decision of this Court, to be a portion of a sentence in the concluding paragraph of the Opinion of the Court of Appeals herein, said to be in conflict with the Lemon case, supra. The decision of this Court in this Lemon case is based upon the fact that the schools to be furnished public funds were in fact a part of the parochial school system and owned and operated by the Roman Catholic Church. This Court lays great stress on this determining factor, stating that the schools involved were "church schools", the school buildings containing "identifying religious symbols such as crosses on the exterior and crucifixes, religious paintings and statues either in the classrooms or hallways", with religious instructions for 30 minutes a day and "religiously oriented extra-curricula activities", with "approximately two-thirds of the teachers in the schools nuns of various religious orders". Accordingly the "parochial schools" were "an integral part of the religious mission of the Catholic Church" and the "various characteristics of the schools make

them 'a powerful vehicle for transmitting the Catholic faith to the next generation.'" (29 L. Ed. 2d at p. 757)

None of these characteristics of a parochial school system exist at the Forest Park High School today, as shown herein in the Statement of the Case in this Brief of the Respondent public School Corporation.

The fact that the schools are parochial schools was extremely important. The Court continued (29 L. Ed. 2d at p. 758-9):

> "In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. In most cases, each individual parish, however, assumes the ultimate financial responsibility for the school, with the parish priest authorizing the allocation of parish funds. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969 lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their number is growing. They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest, and he retains some discretion in negotiating salary levels. Religious authority necessarily pervades the school system.

> The schools are governed by the standards set forth in a 'Handbook of School Regulations,' which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools: 'The prime factor for the success or failure of the school is the spirit and personality, as well as the professional competence, of the teacher . . . . ' The Handbook also states that 'Religious for-courses; nor is it restricted to a single subject area.' Finally the Handbook advises teachers to stimulate interest in religious vocations and missionary work. Given the mission of the church school, these instructions are consistent and logical."

In the instant case, there is no evidence in the record that the Catholic Diocese wanted to, attempted to, or did in fact in any way control any of the schools in the public school system, or any of its teachers, including in particular the teachers at the Forest Park High School.

Petitioners argue (p. 11) that the Opinion of the Court of Appeals herein conflicts with certain other language in this Lemon case, supra, that a "comprehensive, discriminating, and continuing state surveillance will inevitably be required", if the Court in that case would allow public monies to be paid to teachers in a parochial school. But a statement that a state would inevitably be drawn into the "surveillance" of teachers in a parochial school system, where otherwise the state would not have to undertake any such surveillance at all if no public monies

were paid to the parochial schools for teacher salaries, does not "conflict" in any way with this decision of the Court of Appeals herein. In a public high school as here, where the state already has a duty by state law to provide a public school system and to supervise all public school teachers, public school authorities are already obligated to see to the "unambiguous and vigilant enforcement of the commands of the First Amendment", which is their constitutional obligation under the Constitution of the United States, even without this judicial admonition of the Court of Appeals.

Petitioners apparently are arguing that this language in the Lemon case, supra, taken out of context, would prohibit teachers of the Roman Catholic faith, whether nuns or lay teachers, who are otherwise qualified, from teaching in the public school system in the State of Indiana, simply because they would have to be "inspected" to determine their "personal beliefs". Neither the Lemon case, supra, or any other decision of this Court has ever so ruled.

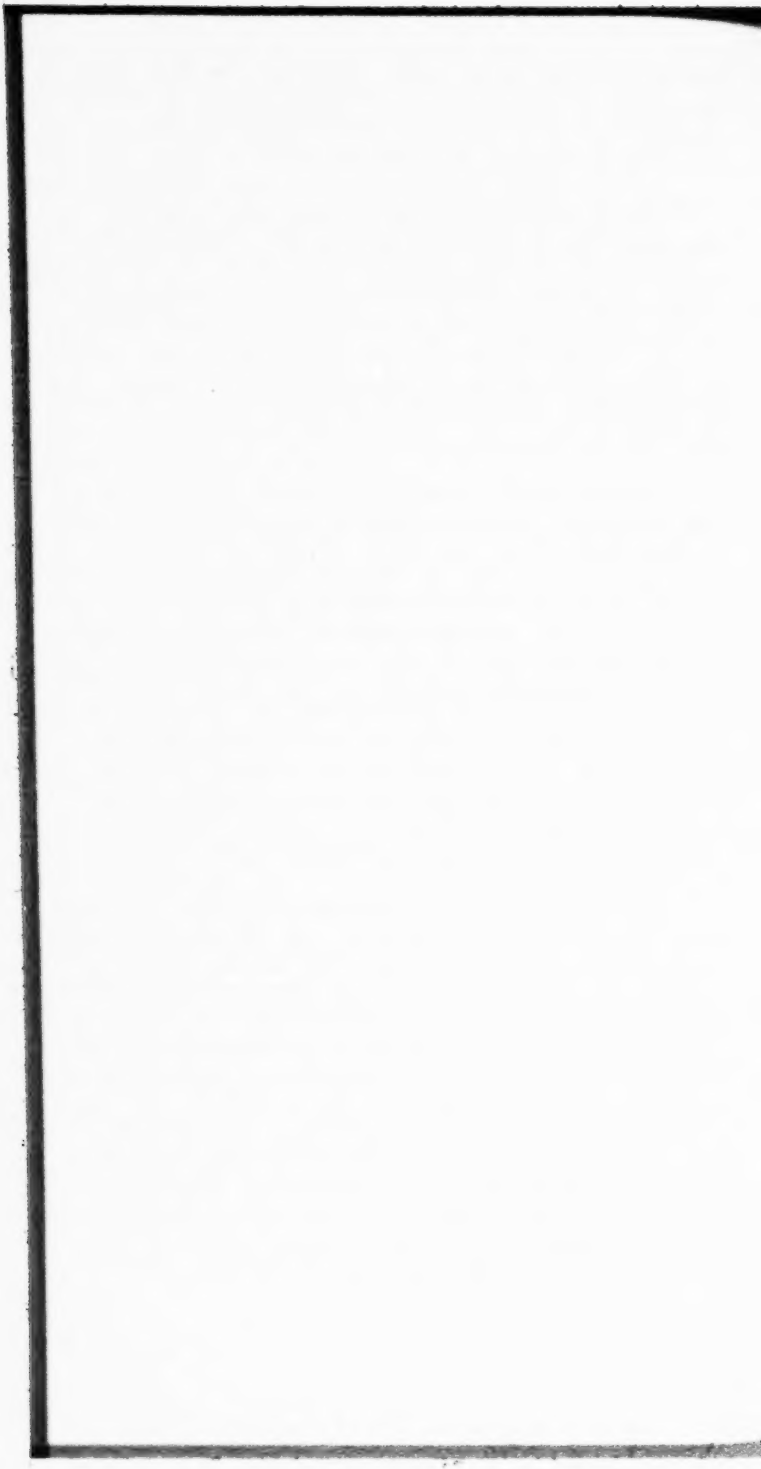
In Board of Education v. Allen (1968) 392 U.S. 236, 88 S. Ct. 1923, 20 L. Ed. 2d 1060, this Court upheld a state statute which required that local school boards purchase textbooks and lend them without charge to all children in grades 7 to 12 of schools which complied with the compulsory education law without regard to whether such schools were public or private. Noting that the ownership of the books remained technically in the state, that no funds or books were furnished to parochial schools, and that the financial benefit was to parents and children rather than to the schools, the Court held that teachers in a sectarian school could constitutionally teach secular subjects to parochial school students using textbooks purchased by

the state, and that such instruction did not necessarily create an "unconstitutional involvement of the state with religious instruction" (20 L. Ed. 2d at 1068).

This Court also held that teachers in the public school system have a First Amendment right of free speech that must be respected by school authorities. Pickering v. Board of Education (1968) 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811. See also Keyishian v. Board of Regents of the Univ. of New York (1967) 385 U.S. 589, 87 S. Ct. 675, 17 L. Ed. 2d 629.

There is no "conflict". In its Opinion, the Court of Appeals herein made special note of the fact that the only relief requested was the re-opening of the Birdseye School, and held (A-2, A-4-5) that the "district court's findings demonstrate that such drastic relief is not justified; we therefore affirm . . . . Defendants have not challenged either the order or the recommendations; Plaintiffs have not made any request for additional relief other than a mandate directing that the old school at Birdseye be re-opened. We are satisfied that the district court acted properly in rejecting this extreme sanction".

In its concluding paragraph, citing this very Lemon case in support, by way of dictum and as a guide to the parties in the future, the Court of Appeals in its Opinion suggests that "the appropriate remedy" here would be for the Respondent School Corporation and the Petitioners, as school patrons, to see to the "vigilant enforcement of the commands of the First Amendment, at the modern, integrated school in Ferdinand". These "commands" had already resulted in the "remedial steps" (A-4) ordered by the District Court, that the nuns discontinue wearing their habits while teaching; that the library contain a more



balanced list of books and periodicals, that paintings or art reproductions exhibited in the school not be predominantly of religious scenes or religious in meaning, and that the collection of reproductions of other painters and sculptors, both ancient and modern, be expanded". The Opinion refers to Finding No. 7 of the District Court, which also states that all books and periodicals purchased for the high school library since January 1, 1969, were authorized and approved by the State Department of Public Instruction of the State of Indiana and are "secular" in content, and takes note that approximately 120 periodicals are now being purchased, and only 20 periodicals relate to the Roman Catholic faith.

This Court has already recognized that the establishment clause in the First Amendment to the United States Constitution would not prevent the use by a public school corporation of buildings formerly occupied by parochial schools, and that Respondent School Corporation may properly lease school facilities from a Catholic Diocese. In State of Nebraska ex rel. The School District of Hartington v. Nebraska State Board of Education (1972) _____Nebr._____, 195 N.W.2d 161, cert. den. ___U.S.___, ___S.Ct.____(1972), 34 L. Ed. 2d 182, the Nebraska Supreme Court upheld against an establishment clause argument the validity of a lease by a public school corporation not of an entire school building, but a lease of only two classrooms in an existing parochial high school conducting classes at the same time. In this case, the majority opinion of the Nebraska Supreme Court held that the lease arrangement did not violate the First Amendment to the United States Constitution saying (p. 163):

> "The First Amendment to the Constitution of the United States provides: 'Congress shall make

no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *.'

* * * * *

If the property used or leased is under the control of the public school authorities and the instruction offered is secular and nonsectarian, there is no constitutional violation. The lease in this case meets these requirements. We find no 'excessive entanglement' between government and religion in the lease involved in this case. See Walz v. Tax Commission, 397 U.S. 664, 90 S.Ct. 1409, 25 L. Ed. 2d 697."

This Court denied certiorari, with a dissenting opinion by Mr. Justice Douglass with whom Mr. Justice Marshall concurred, and with a separate opinion by Mr. Justice Brennan stating his reasons for joining in denying the petition for certiorari.

This particular denial of this petition for certiorari to the Supreme Court of Nebraska is instructive for the reasons set forth in United States v. Kras (1972) ___U.S.___, 93 S.Ct.____, 34 L. Ed. 2d 26, as follows (p. 634):

"Thus, although a denial of certiorari normally carries no implication or inference, Chessman v. Teets, 354 US 156, 164, 1 L Ed 2d 1253, 77 S Ct 1127, n 13 (1957); Brown v Allen, 344 US 443, 97 L Ed 469, 73 S Ct 397 (1953), the pointed dissents of Mr. Justice Black and Mr. Justice Douglas to the denial in Garland

so soon after Boddie, and Mr. Justice Harlan's failure to join the dissenters, surely are not without some significance as to their and the Court's attitude about the application of the Boddie principle to bankruptcy fees."

Mr. Justice Brennan in his opinion relied on the fact (as in the instant case) that "the Hartington School District would have full control over the classrooms and the educational programs; and that no objects, pictures, or other articles having a religious meaning or connotation would be in the classrooms. The lease represented the complete extent of the relations between the School District and the (parochial) school".

Mr. Justice Douglas in his opinion emphasized the fact that the State of Nebraska would be financing instruction in a "parochial school", and quoted the dissent in the Nebraska Supreme Court decision, that "we are not dealing with . . . a mere lease agreement", and that"this procedure requires that the state will be amidst the daily affairs of a religious school".

Obviously, the facts in the instant cause present an equally strong, if not stronger, case for denial of the petition for certiorari. Here the Catholic Diocese no longer operates any schools within the boundaries of the Respondent School Corporation, and the high school facilities are leased under a lease approved by the State of Indiana, with possession and control of the entire school facilities in the Respondent School Corporation.

Finally, Respondent School Corporation would suggest to this Court that Petitioners, in addition to their First Amendment concerns,

also resent the closing of their neighborhood public high school in Birdseye, Indiana, and object to the geographic inconvenience of their children attending the public high school in Ferdinand, Indiana. Their complaint in this cause objecting to conditions in the Forest Park High School was filed August 24, 1971 (1a), even before the Forest Park High School had opened its doors on August 26, 1971, following the school consolidation (10a). Furthermore, Petitioners, in their complaint previously filed in the State court in Indiana, as a part of their requested relief, had picked out an exact location for a new public high school outside of Ferdinand, Indiana, to be built by the Respondent School Corporation (310a).

Conclusion

For the foregoing reasons, Respondent respectfully prays that the Petition be denied.

Respectfully submitted,

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April, 1973

RESPONDENT'S APPENDIX

Memorandum of Decision

COURT'S MEMORANDUM OF DECISION

(Filed September 24, 1971)

* * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

DONALD BUFORD, Et Al.,	)	
	)	
Plaintiffs,	)	
	)	
	)	
-vs-	)	NO. EV 71-C-63
	)	
	)	
THE SOUTHEAST DUBOIS COUNTY SCHOOL CORPORATION,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION

This motion filed August 24, 1971, is a complaint by certain taxpayers and residents of the defendant Southeast Dubois County School Corporation for an injunction to enjoin the defendant School Corporation from closing the Birdseye High School located within the School Corporation at Birdseye, Indiana.

Pursuant to order of this Court, hearing on plaintiffs' request for temporary injunction was held at Evansville, Indiana, on Thursday, September 16, 1971. At the conclusion of the hearing on the application for a temporary injunction, the parties stipulated and agreed that the trial of the action on the merits should be advanced and consolidated with this hearing on the application for a temporary injunction, and the Court ordered such advancement and consolidation.

The Court has considered the testimony and exhibits taken in evidence at the hearing, the trial memorandum of the defendant, the posttrial arguments of counsel, and has taken judicial notice of certain facts believed to be matters of common knowledge, and now files its findings of fact and conclusions of law in the form of this memorandum. Rule 52(a), Federal Rules of Civil Procedure.

I.

General

This is an action asserting certain rights under the First Amendment to the United States Constitution, which prohibits the making of a law "respecting an establishment of religion or prohibiting

the free exercise thereof." The Court is aware that these provisions of the First Amendment to the United States Constitution have been "read into" the Fourteenth Amendment, although the Court's jurisdiction in this regard is not made explicit in the complaint itself. This action is brought against the School Corporation, although jurisdiction may be limited to persons acting under color of law, and a school district (as opposed to its individual members) does not come within the ambit of the Civil Rights Act, Title 28, United States Code, §§1343(3) and (4). Monroe v. Pape, 365 U.S. 167. But no objection having been raised to any jurisdictional defects, if any, this Court will proceed to determine the First Amendment issues in this cause; as to any other issues sought to be raised by plaintiffs, the Court finds that it has no jurisdiction to consider the same.

1. The plaintiffs described themselves as taxpayers "of the Protestant faith" residing in or near the town of Birdseye, Indiana. The residents and taxpayers in the remainder of the School Corporation are predominantly of the Roman Catholic faith.

2. The Southeast Dubois County School Corporation was formed under the School Corporation Reorganization Act of 1959 and came into existence on January 1, 1969, out of three townships in the southeast part of Dubois County, Indiana, namely Jefferson to the east in which the town of Birdseye is located, Jackson in the center and Ferdinand to the south.

3. On or about October 7, 1970, the School Corporation adopted a plan of consolidation of its school facilities, which plan included the closing of the Birdseye High School at the beginning of the 1971-72 school year. The Birdseye High School, built before 1900, with only

104 students, had a total of seven rooms and a former office used for a library, a kitchen and a small cafeteria, with no toilet facilities or student lockers, with only 33 course offerings and with many other insufficiencies. Former Birdseye High School students were transferred to the high school at Ferdinand, which opened on August 26, 1971. The high school at Ferdinand is a modern, up-to-date building, which now has 475 students and 60 course offerings to its students.

4. During the winter and spring of 1971, the student councils of the high schools at Ferdinand and Birdseye, Indiana, held at least five joint meetings, and several "mixers" and proposed to the School Board, as a result of these joint meetings, a new name for the school ("Forest Park High School"), new school colors, mascot, and song, all of which were adopted by the School Board of the School Corporation. Perhaps because of this cooperation between the students of the two high schools, the consolidation of the two high schools was carried out quite successfully, since schools opened this fall and no student or parent objected or complained to school officials to this consolidation in any way.

The Court is impressed at this display of cooperation between the high school students from Birdseye, Indiana, predominantly Protestant, and the other high school students of the School Corporation, predominantly Roman Catholic. The Court can only hope that this display of cooperation may serve to reassure parents and citizens in other school corporations in Indiana who are faced with similar problems relating to the integration of school facilities, which may be required under the authority of Brown v. The Board of Education, 347 U.S.

483, and subsequent decisions of the United States Supreme Court.

5. In converting the former parochial high school to a public high school in 1965, and particularly since the existence of the defendant School Corporation, commencing January 1, 1969, a determined effort has been made by school officials to operate the school system in good faith as a public school corporation and to minimize any religious connection between the schools and the Catholic Diocese. During the current school year, in the high schools, there are sixteen teachers of the Catholic faith, either of whom are nuns who are certified and licensed by the State of Indiana, and twelve teachers who are of the Portestant faith. Both the Principal of the Forest Park High School and its Guidance Director are of the Protestant faith. No religious instructions have been given in the high school building for many years. All religious statues, artifacts and symbols of the Catholic faith were removed from the high school at Ferdinand shortly after the formation of the defendant School Corporation. Although not directly involved in this lawsuit, some evidence was heard at [illegible]ial concerning the elementary schools of the School Corporation. It is the recommendation of this Court that the decision of school officials not to hold any religious instructions in any of the classrooms in any of the elementary schools during the school week be continued in the future. It is the further recommendation of this Court that the principals of the elementary schools make sure that the schools do not handle the sale of any religious workbooks, even if separate accounts are kept, and that school officials be sure that bus schedules are designed to accommodate the students attending classes in the public schools, and are not scheduled to coordinate necessarily with the times of any

church services before or after school hours. Again, although not directly involved in this lawsuit, the Court also recommends that any statuary or other Catholic artifacts of religious significance be removed from grade school classrooms and from the grade school property itself.

6. The high school at Ferdinand is leased over a period of years from the Catholic Diocese, with the building to belong to the School Corporation at the end of the lease for a total yearly rental of approximately $550 per room. The grade schools in Ferdinand, Indiana, and in St. Anthony, Indiana, are leased from the Catholic Diocese at a total yearly rental of approximately $550 per room. A basement room in the Catholic Church in Schnellville, Indiana, is leased from the Catholic Diocese for $550 a year, for use as a cafeteria and kindergarten. These rental charges seem reasonable. A frame building at Schnellville and the grade school at Birdseye are owned by the School Corporation as is the former Birdseye High School, which is not partially used by grade school students.

7. All books and periodicals purchased for the library since January 1, 1969, have been authorized and approved by the State Department of Public Instruction of the State of Indiana. Approximately 120 periodicals are now being purchased, of which approximately 20 are periodicals relating to the Roman Catholic faith. Such books purchased since January 1, 1969, might be called "secular" in content. The Court would, again, enter no specific order, but would recommend that school officials review their subscriptions of current periodicals and book lists so that either materials having a religious

orientation be eliminated, or that writings reflecting the beliefs of Protestant denominations represented in the County, as well as those of the major non-Christian religions be made available to students. In any event, it should be understood that such materials are merely to be available for examination by such students as desire to read them, and the same should not be required to be used for assigned work. The Court also recommends that paintings or art reproductions exhibited in the schools not be predominantly of religious scenes or religious in meaning, but that the collection of reproductions of other painters and sculptors, both ancient and modern, be expanded.

II.

Order of the Court

IT IS HEREBY ORDERED that the application of the plaintiffs, on First Amendment grounds, to enjoin the defendant Southeast Dubois County School Corporation from closing the Birdseye High School, or, in the alternative, to mandate the reopening of the Birdseye High School, is hereby denied.

IT IS FURTHER ORDERED that the defendant Southeast Dubois County School Corporation take steps forthwith to see to it that its teachers who are nuns of the Roman Catholic faith shall not wear their habits or their veils while teaching in the school system. The Court does not purport to decree what manner of dress would be appropriate for these teachers, in any detail, but would suggest that their clothing be of a color and style that avoids the appearance of uniformity, or a uniform, in order that in appearance they might not be otherwise distinguishable from other teachers.

Memorandum of Decision

IT IS FINALLY ORDERED AND ADJUDGED that the plaintiffs pay the costs of this action.

Entered this 24th day of September, 1971, as per oral findings and order of September 16, 1971.